

SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

*Appellant,  
against*

CARLISLE & JACQUELIN, *et al.*,

*Appellees.*

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BRIEF OF THE ATTORNEY GENERAL OF THE  
STATE OF NEW YORK AS *AMICUS CURIAE* IN  
SUPPORT OF REVERSAL

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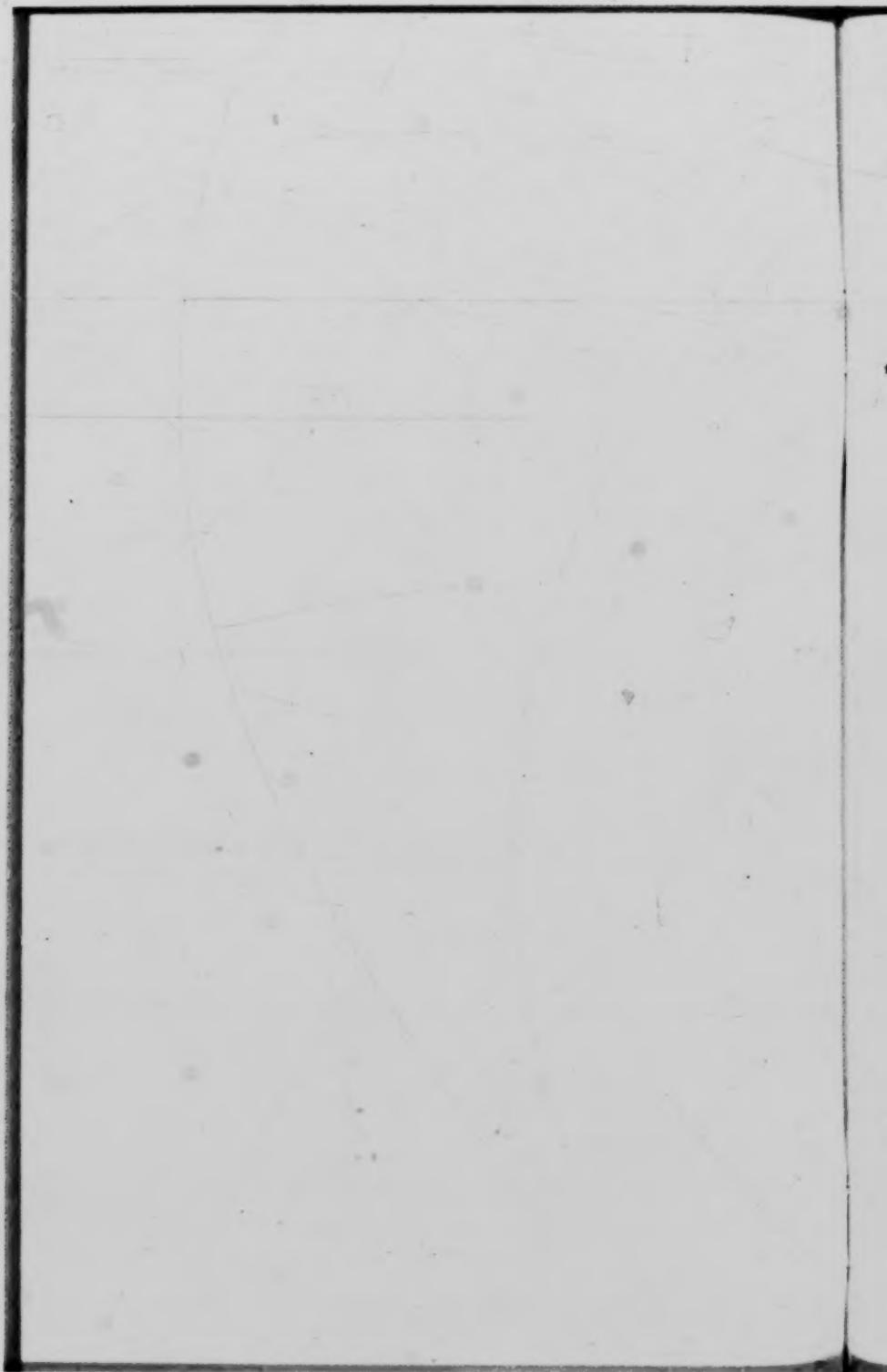
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**BRIEF OF THE ATTORNEY GENERAL OF THE  
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**Interest of the Amicus**

New York State is concerned with the instant action because it bears upon the ability of large numbers of individuals to redress injuries which they have suffered as a group. Providing remedies to consumers victimized in the marketplace, ending unlawful discriminatory practices that violate the civil rights of particular classes of persons and protecting the interest of the public in an unpolluted environment are policies and goals that New York State forcefully advocates. But governmental interest alone cannot relieve

such group injuries, for federal and state budgets and manpower are limited. Private legal class actions, therefore, are necessary to provide effective relief to large classes of citizens who suffer a common injury.

As one of the most populous states in the country, with diverse metropolitan areas and innumerable businesses and industries, New York State is especially aware that many large groups of individuals are exposed to similar types of injuries which cannot be remedied practicably through individual legal action. Collective damages in such instances may amount to substantial sums, but individual claims are often so small that the cost of litigation precludes their pursuit. Moreover, legal redress which is secured on an individual basis enables wrongdoers to retain most of the fruits of their illegal activity and is at best a haphazard and an uncertain deterrent to similar conduct in the future.

Class actions overcome these difficulties by allowing one member of the injured group to sue in the name of all others similarly situated. Class suits thereby serve a quasi-public function; they offer obvious economic and procedural advantages over a multiplicity of single lawsuits and exert a far stronger prophylactic influence upon defendants. Furthermore, they offer both the representative and the class the incentive of recovering their damages if they prevail. In particular, since the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure did away with the awkward categorization of class actions into "true," "hybrid" and "spurious"\*\* the Federal District Courts have generally provided more receptive, uniform forums for large class actions than have state courts.

New York State, therefore, considers the outcome of the instant case to be of particular importance. The opinion

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\* Proposed Rules of Civil Procedure (Advisory Committee's Note to Amended Rule 23), 39 F.R.D. 69, 98.

of the Second Circuit Court of Appeals, if sustained by this Court, will restrict the discretion exercised by Federal District Courts in determining the manageability of class actions brought under Rule 23. It will also preclude a flexible approach to the problems of notice to the class (including the type of notice and the allocation of its cost) and form of recovery which are peculiar to each case. This view is not only contrary to the liberal spirit of the 1966 amendments to Federal Rule 23, but is also contrary to the latest recommendations contained in the federal Manual For Complex Litigation, § 1.45 (Notices In Class Actions), and will severely limit the use of federal class actions by those large, multifarious classes whose damages are the most extensive of all.

The State of New York, by its Attorney General, Louis J. Lefkowitz, accordingly files this brief as *amicus curiae* in support of reversal pursuant to Rule 42 of the Rules of this Court.

### **Questions Presented**

1. Are the requirements of due process and Rule 23 (c)(2) of the Federal Rules of Civil Procedure satisfied, in a class action where the class consists of six million members of whom two million are reasonably identifiable, by directing individual notice to the two thousand class members with sufficient stake in the proceedings to justify personal intervention and to five thousand other class members selected at random, in addition to published notice?
2. Does the Federal District Court have discretion to allocate to the defendants ninety percent of the cost of notice to the class where the individual plaintiff cannot afford to pay for such notice and has demonstrated in a preliminary evidentiary hearing the probability of his success on the merits?

3. May the application of a "fluid class recovery" theory be considered by the District Court in order to benefit the class as a whole once individual members' claims have been satisfied?

### **Statement of the Case**

This is an appeal from a decision of the United States Court of Appeals, Second Circuit, decided May 1, 1973, which dismissed this case as a class action, reversing the United States District Court for the Southern District of New York, which had held that this case was maintainable as a class action and that the cost of notifying the class should be allocated between the parties.

The appellant herein was a trader in "odd-lots" (lots of less than one hundred shares) of securities on the New York Stock Exchange. Alleging that two brokerage firms, appellees Carlisle & Jacquelain and DeCoppett & Doremus, had combined to monopolize odd-lot trading and, assisted by the failure of appellee New York Stock Exchange to adopt rules protecting investors in odd-lots, had set an excessive charge for handling odd-lots (the "odd-lot differential"), Eisen brought a class action in the name of all purchasers and sellers of odd-lots on the New York Stock Exchange between May 1, 1962 and June 30, 1966. This class included approximately six million such investors. The average odd-lot trader engaged in five transactions during this period. Each transaction averaged 28.2 shares, at a cost of \$50.84 per share, and the average odd-lot differential was \$5.18.

The District Court initially dismissed the case as a class action without prejudice to Eisen's litigating his individual claim. *Eisen v. Carlisle & Jacquelain*, 41 F.R.D. 147 (S.D.N.Y. 1966). Eisen appealed this order to the Second Circuit Court of Appeals, and defendants moved to dismiss

the appeal on the ground that the District Court's ruling was a nonfinal order. The Second Circuit held, in what has come to be known as "*Eisen I*", that the interlocutory order dismissing the case as a class action was appealable because, in light of the small individual claims and the disproportionate cost their litigation would involve, it sounded the "death knell" of the lawsuit. *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), cert. den. 386 U.S. 1035 (1967).

Subsequently, in "*Eisen II*", the Second Circuit held that the District Court's dismissal of the matter as a class action had been based upon an insufficient analysis of the standards contained in Rule 23 of the Federal Rules of Civil Procedure. The case was remanded to the District Court for evidentiary hearings on the issues of notice, representation, administration and other appropriate matters, the Second Circuit expressly retaining jurisdiction. *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2d Cir. 1968).

On remand, the District Court found that the issues of manageability and notice were essential to a determination of whether a class suit could proceed. *Eisen v. Carlisle & Jacquelin*, 50 F.R.D. 471 (S.D.N.Y. 1970). The District Court then held that the case was in fact manageable as a class action and that individual notice to the two million identifiable class members was unnecessary. *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971). After a preliminary hearing on the merits, the District Court also allocated ninety percent of the cost of notice to defendants. *Eisen v. Carlisle & Jacquelin*, 54 F.R.D. 565 (S.D.N.Y. 1972).

On May 1, 1973, in "*Eisen III*", the Second Circuit Court of Appeals, holding that defendants could appeal the order granting leave to proceed as a class action, reversed the District Court and ruled that individual notice must be sent, at Eisen's sole expense, to all identifiable class members; that the District Court's contemplated use of a fluid class recovery theory to apply any damages unclaimed by individual

class members to the benefit of the class as a whole was improper; and that the action was unmanageable as a class action. On May 24, 1973, the Second Circuit denied Eisen's petition for a rehearing *en banc*. *Eisen v. Carlisle & Jacqueline*, 479 F. 2d 1005 (2d Cir. 1973).

### POINT I

**Requiring plaintiff to provide and pay for individual notice to two million identifiable class members is contrary to a liberal interpretation of Federal Rule 23 and is not dictated by the standards of due process.**

**A. Rule 23 allows courts great flexibility in administering class actions.**

Federal Rule 23 was amended in 1966 in order to describe "in more practical terms the occasions for maintaining class actions." Proposed Rules of Civil Procedure (Advisory Committee's Note to Amended Rule 23), *supra*, 39 F.R.D. at p. 99. The original Rule 23 had defined class actions in such abstract categories as to obscure the instances in which they could appropriately be brought. The interpretation of amended Rule 23 enunciated by the Second Circuit Court of Appeals in the *Eisen* case has revived this problem by taking a restrictive view of class actions brought under Rule 23(b) (3), where the class is characterized by common questions of law or fact.

Historically, equitable considerations have played an important role in dealing with large, diverse classes similar to the class represented by Eisen. "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable." *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). Pro-

fessor Moore notes:

"Class suits evolved in English equity through necessity. In order to do complete justice compulsory joinder of all interested persons became the general, accepted rule in chancery. But this rule, relentlessly applied, would preclude decision of cases where it was impracticable or impossible to get all the interested persons before the court. The class action was both an escape from and an adjustment to the rule of joinder. Its utility and the impracticability of any other type of procedure gave impetus to its development." 3B *Moore's Federal Practice*, at p. 23-72.

Class suits became recognized for similar reasons by state and federal courts in the United States as well. Rule 38 of the Equity Rules of 1912 set forth the established federal practice as follows:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

As class actions developed, the need for finality and for avoiding repetitious litigation by individual class members became apparent. "If the decree [in class actions] is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree." *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363 (1921). Unfortunately, the problem was complicated by the enactment in 1937 of original Rule 23 of the Federal Rules of Civil Procedure, which characterized class rights as:

"(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

The first two categories above were the so-called "true" and "hybrid" class actions, respectively, and represented an attempt to restate and clarify Equity Rule 38 in light of its construction by federal courts. However, the third category, the "spurious" class action, was an expansion of the existing rule and a departure from past practice because it incorporated a *permissive* joinder device, "common question of law or fact." Original Rule 23 was interpreted liberally. *Weeks v. Bareco Oil Co.*, 125 F. 2d 84, 88 (7th Cir. 1941). Nevertheless, courts had difficulty in applying these terms to actual classes and in defining the extent of judgments in class actions. Only the parties were bound in "spurious" class actions, creating an anomalous sort of "class", indeed, whose members, if not joined, could proceed individually even after a decision on the merits affecting the class had been rendered. Actions were classified inconsistently, and often the result which seemed appropriate in terms of its *res judicata* effect, rather than the provisions of original Rule 23, governed the designation of classes. See Proposed Rules of Civil Procedure (Advisory Committee's Note to Amend Rule 23), *supra*, 39 F.R.D. at pp. 98-99; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356 (1967) at p. 385.

Despite these difficulties, the class action frequently was resorted to by groups of individuals, with small personal claims, linked together by a common legal or factual basis. Professors Kalven and Rosenfeld observed in *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684

(1941) at p. 686 that “[m]odern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress . . .” Such groups, they note at p. 684, may include:

“[t]he employee who is entitled to time and a half for overtime, the stockholder who has been misled by a false statement in a prospectus, the rate-payer who has been charged an excessive rate, the depositor in a closed bank, the taxpayer who resists an illegal assessment, or the small businessman who has been the victim of a monopoly in restraint of trade . . .”

Amended Rule 23 sought to eliminate the confusing distinctions which had created such uncertainty in the use of class actions. Thus, although amended Rule 23(b)(3), under which the *Eisen* case is maintained, refers to “questions of law or fact common to the members of the class,” it does not correspond to the former “spurious” class action. The mere existence of common questions of law or fact does not suffice to constitute a class.

In the instant case, for example, the class members are commonly aggrieved by having been charged an arbitrary and excessive odd-lot differential by appellees during the period 1962-1966. Rule 23(b) (3) provides that the court must determine (a) whether or not this common issue predominates over any interest that individual members have in separately pursuing the questions which affect them and (b) whether or not a class action is superior to other available methods of proceeding. It then states:

“The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the par-

ticular forum; (D) the difficulties likely to be encountered in the management of a class action."

Here, the Second Circuit Court of Appeals has concentrated on the issue of manageability to the exclusion of practically all other matters. But "difficulties in management are of significance only if they make the class action a less 'fair and efficient' method of adjudication than other available techniques." *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 282 (S.D.N.Y. 1971) (emphasis original).

Furthermore, as the First Circuit Court of Appeals said in *Yaffe v. Powers*, 454 F. 2d 1362 (1st Cir. 1972), a case where the class was amorphously defined in terms of all individuals who wished to engage in peaceful political discussion in the city of Fall River, Massachusetts, without police harassment (at p. 1365):

" . . . for a court to refuse to certify a class . . . because of vaguely-perceived management problems is counter to the policy which originally led to the rule, *and more especially, to its thoughtful revision*, and also to discount too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise . . . "

(and again at p. 1367):

*"The genius of Rule 23 is that the trial judge is invested with both obligations and a wide spectrum of means to meet those obligations . . . [T]he burden of administering this kind of a class suit should not be pessimistically estimated."* (Emphasis supplied.)

In addition, Rule 23(d) empowers the court, "in the conduct of actions to which [Rule 23] applies," to "make appropriate orders . . . dealing with . . . procedural matters."

It is clear that in treating the management problems posed by the questions of notice and by the administration of plain-

tiff's possible recovery, the Second Circuit has ignored the equitable design of Rule 23 and the concomitant flexibility and power which courts have thereunder. Its reluctance to permit the exercise of such discretion, as Judge Tyler undertook to do earlier in this case (*Eisen v. Carlisle & Jacquelin, supra*, 52 F.R.D. 253), precludes any effective application of Rule 23 to the particular circumstances of each case as it arises.

**B. Neither Rule 23 nor due process requires that individual notice be given to the members of the class.**

The equitable concern which Rule 23(b)(3) shows for the individual interests of class members appears again in the provisions of Rule 23(c)(2):

“In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.”

The opportunity given a class member to opt out of the proceedings or to be bound by them has little practical bearing on this case because the damages sustained by the average class member are so small as to make it extremely unlikely that he would pursue his claim. This very fact led the Second Circuit in “*Eisen II*” (*Eisen v. Carlisle & Jacquelin, supra*, 391 F. 2d 555) to remand the case to Judge Tyler for an evidentiary hearing on notice and other matters, well aware that a summary denial of leave to proceed as a class would sound the “death knell” of the action because of the disproportionate cost of individual lawsuits.

Nevertheless, the fact that no other class member has indicated a willingness to participate in *Eisen* does not detract from the action. As Judge Weinstein has noted in *Revision of Procedure: Some Problems in Class Actions*, 9 Buff. L. Rev. 433 (1960):

“A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his rights . . . The court need concern itself only with whether those members who are parties are interested enough to be forceful advocates and with whether there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice.” 9 Buff. L. Rev. at p. 460.

See also *Korn v. Franchard Corp.*, 456 F. 2d 1206 (2d Cir. 1972).

In this context, what constitutes “the best notice practicable under the circumstances” is a determination that is well within the discretion of the court. Accordingly, when Judge Tyler devised his notice plan for *Eisen*, he took into consideration the facts which are peculiar to this case and shaped “the best notice practicable” to fit them. Only one-third of *Eisen*’s six million-member class can be identified through reasonable effort, and of these, only some two thousand have engaged in ten or more odd-lot transactions during the period in question. Judge Tyler directed individual notice to these two thousand persons, whose financial interest in relation to that of the rest of the class seemed strong enough to warrant their possible intervention, together with individual notice to five thousand other class members to be selected at random and published notice to appear in the Wall Street Journal and in financial sections of newspapers in New York, San Francisco and Los Angeles, where the greatest numbers of class members were located.

In short, the District Court in *Eisen* merely held that individual notice to all reasonably identifiable class members is not "the best notice practicable under the circumstances." A similar procedure was followed in *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd* 440 F. 2d 1079 (2d Cir.), *cert. den. sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971), which involved sixty-six consolidated class actions brought under Rule 23(b)(3). Three classes of purchasers of antibiotic drugs were involved: governmental and institutional purchasers; consumers; and wholesalers and retailers. Notice to the enormous, diverse consumer class was directed by publication. In affirming the result the Second Circuit Court of Appeals noted:

"There are no precise rules as to what constitutes adequate notice, and the due process standards have been held to vary depending on the circumstances of each case. In the present action, notice by publication was obviously the only practical alternative." 440 F. 2d at p. 1090.

Some sort of notice to the class is mandatory under Rule 23(c)(2); individual notice is mandatory only if it is the best practicable. See Proposed Rules of Civil Procedure (Advisory Committee's Note to Amended Rule 23), *supra*, 39 F.R.D. at pp. 106-107; Manual For Complex Litigation, § 1.45 (Notices In Class Actions). This view of notice is consistent not only with amended Rule 23, but with the standards of due process as well. The court in *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969), stated:

"Although traditional due process standards require that the notice be one reasonably calculated to apprise members of the class of their opportunity to object or to 'opt out' rather than be bound by the determination of the class action, . . . we would be naive not to recognize that where (as here) the maximum amount re-

coverable on behalf of each of thousands of stockholders would be quite small, those receiving notice would in all probability not have enough incentive to take any action . . . To overemphasize the notice requirement would be to stymie the purpose of the class action device . . ." 48 F.R.D. at p. 129.

A pragmatic approach to notice in a particular proceeding is not precluded by the "traditional due process standards" referred to above. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Once the court is convinced that there is substantial merit to plaintiff's claims and that the class action device is the practicable method of vindicating these claims, it will not let procedural difficulties stand in its way." *Dolgow v. Anderson*, 43 F.R.D. 472, 481 (E.D.N.Y. 1968). In light of what the individual interests in *Eisen* are actually like, the notice ordered by Judge Tyler certainly constituted "notice reasonably calculated, under all the circumstances, to apprise all interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, *supra*, 339 U.S. at p. 314 (emphasis supplied). *Schroeder v. City of New York*, 371 U.S. 208 (1962), reiterated rather than altered the case-by-case approach of *Mullane* and in fact reemphasized its flexibility by holding that individual notice must be given to a single, "very easily ascertainable" person with a substantial direct interest in the particular proceedings. The nature of the legally protected rights and of the class involved in *Eisen*, "under all the circumstances" and particularly since the adequacy of appellant's representation is unquestioned in these proceedings, does not require such individual notice to satisfy due process. *Hansberry v. Lee*, *supra*, 311 U.S. at pp. 42-44.

**C. Rule 23 does not require the plaintiff in a class action to bear the cost of notice.**

When the Second Circuit remanded this case to the District Court in 1968, it directed the holding of an evidentiary hearing "on the questions of notice, adequate representation, effective administration of the action, *and any other matters which the District Court may consider pertinent and proper.* *Eisen v. Carlisle & Jacquelin, supra,* 391 F. 2d at p. 570 (emphasis supplied). Exercising this discretion, granted him also under Rule 23(c)(2), which says that notice shall be as "the Court shall direct", Judge Tyler held a preliminary evidentiary hearing on the merits in order to determine how the cost of notice should be allocated between the parties. As a result of this "mini-hearing" the court concluded that Eisen had demonstrated the probability of his success on the merits and allocated ninety percent of the cost of notice to defendants.

It has always been clear that Eisen cannot sustain the entire cost of notice; if he were arbitrarily assigned this burden, which nothing in Rule 23 requires him to assume, this class action could proceed no further. The class suit's roots in equity and the spirit of amended Rule 23, however, preclude courts from simply closing their doors to litigants because of such "novel and difficult questions." *In Re Antibiotic Antitrust Actions, supra,* 333 F. Supp. at p. 289. Moreover, the public interest served by class actions demands that courts exercise the full range of administrative options provided them by Rule 23.

In the instant case, the District Court considered the merits of Eisen's claim, not in order to determine the propriety of proceeding as a class (it was apparent from the outset that a class action was the only feasible way to proceed), but in order to decide who should pay for notice to that class. *Cf. Miller v. Mackey International, Inc.,* 452 F. 2d 424 (5th Cir. 1971). Not only is such a resourceful application of the court's administrative powers within the contemplation of

Rule 23, it has been suggested and made before. *Dolgow v. Anderson, supra*, 43 F.R.D. at pp. 498-501, and *Ostapowicz v. Johnson Bronze Co.*, 54 F.R.D. 465 (W.D. Pa. 1972). See also *Berland v. Mack, supra*, 48 F.R.D. at pp. 131-132.

## POINT II

**The application of a "fluid class recovery" theory may be considered by the court in administering any relief that is awarded the plaintiff in this class action.**

The *Eisen* case was brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, which grants plaintiffs thereunder direct jurisdiction in the Federal District Courts, obviating the usual ten thousand dollar jurisdictional prerequisite. As discussed above, amended Rule 23 is designed to enable groups of individuals whose personal damages are small enough to preclude their undertaking private legal action to redress their grievances, nonetheless, as a class. Particularly in areas like securities, antitrust, consumer protection and civil rights, where the injuries to private citizens are the everyday concern of government, class actions serve an important public need that understaffed and inadequately budgeted governmental agencies cannot fulfill alone. It is obvious that the most far-reaching wrongs committed in these areas will create, as in *Eisen*, the most extensive and varied classes.

Class actions compel defendants who conduct their activities "to the detriment of millions of individual[s]" to disgorge "their ill-gotten gains which, once lodged in the corporate coffers, are [otherwise] said to become a 'pot of gold' inaccessible to the muled consumers because they are many and their individual claims small." *In Re Antibiotic Antitrust Actions, supra*, 333 F. Supp. at pp. 282-283. But in *Eisen*, as in many large class actions, a large proportion of the class membership cannot be identified. Once adjudged damages have been applied to satisfy individual claims, therefore, a substantial fund will remain for the court to administer.

Contrary to the view of the Second Circuit, this does not pose so insuperable a problem as to make *Eisen* unmanageable. The flexibility and discretion which Rule 23 gives the courts extends as well to consideration of forms of recovery that are appropriate to the facts of each case. Where legal rights protected by federal statutes are violated, courts have a duty to provide remedies to effectuate the Congressional purpose. *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). As Professor Miller stated in *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501:

"Courts should not be reluctant to adopt procedures . . . that seem to fit a particular case. These steps are not radical deviations but have a strong relationship to the wide range of approaches utilized by the courts in the analogous process of framing equity decrees." 54 F.R.D. at pp. 510-511.

Thus, the application of a "fluid class recovery" theory to the *Eisen* case is certainly within the discretion of the court. That portion of any recovery which remained undistributed after individual claims were paid would be used to benefit the class as a whole, perhaps by reducing the differential to be charged in future odd-lot transactions or by being applied to a related public purpose by the government. *Bebchick v. Public Utilities Commission*, 318 F. 2d 187 (D.C. Cir.), cert. den. 373 U.S. 913 (1963), although not a class action, used a fluid recovery theory in order to apply the fund represented by a retroactively abrogated transit fare increase to the future benefit of the class of mass transit riders who had paid it in the interim. See also *State of West Virginia v. Chas. Pfizer & Co., supra*, 314 F. Supp. 710, the judicially approved settlement of which incorporated a fluid class recovery without creating ungovernable management problems. *Snyder v. Harris*, 394 U.S. 332 (1969), cited by the Second Circuit as authority precluding a fluid class recovery theory, is entirely in-

apposite to *Eisen*. Federal jurisdiction was not directly granted by statute in *Snyder*, but was sought on the basis of diversity of citizenship. The claim of the individual plaintiff still had to amount to ten thousand dollars, and this Court held that it could not be aggregated with the claims of the rest of the class in order to reach that figure.

Class actions help to make laws which protect the public interest more nearly self-enforcing by enabling private individuals jointly to pursue their common claims. If courts fail to devise a remedy when such wrongs occur, then the wrongdoer will be able to retain illegal profits and avoid intended sanctions with impunity. Any difficulty in administering a recovery is certainly not the fault of the injured class. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

### **CONCLUSION**

**For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit denying this case leave to proceed as a class action should be reversed.**

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Respectfully submitted,

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